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No. 00-1637

IN THE

# Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
*Petitioner,*

v.

HOMER DYE, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the Circuit Court of Mingo County, West Virginia**

## REPLY BRIEF OF PETITIONER

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## REPLY BRIEF OF PETITIONER

In their brief in opposition, Respondents essentially do not dispute that there is a mature split among the lower courts on the two questions presented by Norfolk & Western Railway Company ("N&W"). Rather, Respondents attempt principally to draw irrelevant legal and factual distinctions to suggest that this case does not implicate those conflicts of authority. Their arguments are unavailing.

1. *Emotional distress.* There is a square conflict among the lower courts as to whether a plaintiff may recover for emotional distress in a FELA action absent some medical or physical manifestation of that distress. Pet. 11-20. Respondents wrongly allege that this split of authority is not relevant to the decision below simply based on the presence in this case of a significant "physical impact" or injury (namely, asbestosis). Opp. 10-11. Their argument is based on a misunderstanding of the distinctions drawn in *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994), and in the common law.

Many "physical impact" cases in the common law's progress towards the recognition of emotional-distress damages concern what is known in modern parlance as "pain and suffering": *i.e.*, mental harms "stemming *directly* from a physical injury or condition." *Id.* at 544 (emphasis added) (internal quotation marks omitted). For such cases, there was no separate requirement of physical or emotional manifestation of harm; the sole limitation was that any provable damages recovered for mental distress be the "direct and natural result of an injury sustained." *Hetrick* v. *Willis*, 439 S.W.2d 942, 943 (Ky. 1969) (denying recovery where plaintiff's depression not linked to physical injury from auto accident). But this Court in *Gottshall* cordoned off negligent infliction of emotional injury as "apart from the tort law concepts of pain and suffering." 512 U.S. at 544. The Court defined the separate tort of negligent infliction of emotional injury as

"mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and *that is not directly brought about by a physical injury*, but that may manifest itself in physical symptoms." *Id.* (emphasis added).

In *Gottshall*, this Court identified "[t]hree major limiting tests for evaluating claims alleging negligent infliction of emotional distress": the physical-impact test, the zone of danger test, and the relative-bystander test. *Id.* at 546, 547-49. Given the purposes of FELA, this Court adopted the zone-of-danger test, which includes but is not limited to physical impacts: "the zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, *or* who are placed in immediate risk of physical harm by that conduct." *Id.* at 547-48 (emphasis added). It was the "physical impact" prong of the zone-of-danger test that this Court addressed in *Metro-North Commuter Railroad* v. *Buckley*, 521 U.S. 424 (1997), deciding that development of an asbestos-related disease was necessary for recovery of emotional-distress damages caused by fear of asbestos-related cancer. *Id.* at 430. There is no doubt that the common law jurisdictions adopting the zone-of-danger test have long required physical or objective manifestation of the claimed emotional injury as a precondition for recovery. *Gottshall*, 512 U.S. at 549 n.11 ("Many jurisdictions that follow the zone of danger or relative bystander tests also require that a plaintiff demonstrate a 'physical manifestation' of an alleged emotional injury."); see Pet. 13-14. Respondents' assertion that the presence of a physical impact eliminates the manifestation requirement has no basis in law.[1]

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[1] Respondents claim that in many jurisdictions fear of cancer claims do not require any manifestation of emotional distress. *See* Opp. 19-20. This would not alter the majority rule, but in any event many of the cited cases explicitly required some manifestation or objective corroboration of the plaintiff's fear of cancer. *See, e.g.*, *Dunn* v. *HOVIC*, 1 F.3d 1362, 1365 (3d Cir. 1993) (allowing recovery for emotional distress where

The split of authority has arisen over whether FELA incorporates the common-law manifestation requirement, and Respondents fail in their attempt to distinguish individual cases within the relevant conflict of authority. For example, Respondents allege that the Fifth Circuit rejected a manifestation requirement for emotional distress claims in *Hagerty* v. *L & L Marine Services, Inc.*, 788 F.2d 315 (5th Cir.), *reh'g en banc denied*, 797 F.2d 256 (5th Cir. 1986). Opp. 10. Respondents, however, ignore the Fifth Circuit's later opinion noting that "a plaintiff may recover damages for *serious* mental distress." *Hagerty* v. *L & L Marine Servs., Inc.*, 797 F.2d 256, 256 (5th Cir. 1986) (emphasis added). Respondents distinguish the decision in *Bullard* v. *Central Vermont Railway*, 565 F.2d 193 (1st Cir. 1977), based solely on the fact that the plaintiff there sought recovery for emotional distress other than fear of future injury. Opp. 10. This distinction is clearly irrelevant to the question presented.

Respondents also attempt to dilute the split of authority by asserting that most of the cases predate the Court's decisions in *Gottshall* and *Buckley*. Again, this argument is clearly without merit because the Court has left this particular question unaddressed. Pet. 14-17. In *Gottshall*, the Court acknowledged the two separate common law "limitations on the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable." 512 U.S. at 546. In both *Gottshall* and *Buckley*, the Court addressed only the first limitation through its adoption and application of the

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plaintiff suffered from depression and a "great fear of contracting cancer"), *modified on other grounds*, 13 F.3d 58 (3d Cir. 1993); *Mauro* v. *Owens-Corning Fiberglas Corp.*, 542 A.2d 16, 24 (N.J. Super. 1988) ("[s]ufficient evidence was presented to permit the jury to find plaintiff suffered from serious emotional distress"), *aff'd*, 561 A.2d 257 (N.J. 1989); *Lavelle* v. *Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476, 481 (Ohio Ct. C.P. 1987) (requiring "a reasonable apprehension [of contracting cancer] which manifests itself in mental distress"); *Denton* v. *Southern Ry.*, 854 S.W.2d 885, 889 (Tenn. Ct. App. 1993) ("Under FELA, a claim becomes compensable when it is manifest.").

"zone of danger" test. *Id.* at 554-56; 521 U.S. at 430. Without any direct treatment of the second limitation, it is irrelevant whether the split of authority arose before or after *Gottshall* and *Buckley*. The relevant conflict is as alive today as before these decisions.

Contrary to Respondents' assertions, this case is the perfect vehicle for addressing the question presented. First, it is difficult to conceive of a case in which a plaintiff could present any less evidence of emotional distress. The only relevant evidence was Respondents' own testimony that they are "aware of," "think[] about," or "worr[y] about" contracting cancer sometime in the future. Opp. 6-7. In their opposition, Respondents merely present a lengthy narrative of the physical limitations on their daily activities, but nothing regarding a manifestation of their "fear" of cancer. *Id.* Respondents otherwise refer to medical testimony that "people with occupational exposure to asbestos, silica and coal dust *should have* real concern about developing cancer." *Id.* at 4 (emphasis added). Again, this testimony does not establish that Respondents actually experienced emotional distress.

Petitioner does not dispute that Respondents are entitled to have a jury determine their pain-and-suffering damages from asbestosis (such as shortness of breath). But those damages could not justify the multimillion dollar judgment awarded; this case was predominantly about fear of cancer. Although they repeat at length the trial testimony that asbestos exposure causes cancer, *id.* at 4-5, Respondents do not contest the uncontradicted evidence that asbestosis is not causally linked to cancer. The emotional injuries they claim, while coincident with the "physical impact" of asbestosis, are not pain and suffering that stems directly from the asbestosis. Rather, the injuries "result[] solely from the internal operation of fright or other emotional disturbance." *Restatement (Second) of Torts* § 436(2) (1965). Under the common-law rules that should govern under FELA, they are compensable only if manifested in a physical or medical condition.

Respondents lastly argue that this case is not a good vehicle because the general verdict form prevents the Court from deciphering the damages awarded for fear of cancer. Opp. 8-9. But the general verdict makes this issue more compelling, not less. The question is whether the judge erred in submitting the fear of cancer claim to the jury at all. See *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919) ("in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury"). Such objections to this Court's review are common in tort cases, and just as commonly rejected by this Court. See, *e.g.*, *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344, 351 (2000); Br. for Resp't in Opp'n to Pet. for a Writ of Cert. at 8-9, *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344 (2000). The question on which the courts are divided is thus cleanly presented by this case and, as underscored by Respondents' clear misreading of *Gottshall* and *Buckley*, merits immediate resolution.

2. *Apportionment.* N&W demonstrated that there is a square decisional conflict on the critical question of apportionment of damages under FELA. Pet. at 20-26. The Court's resolution of this deep and mature conflict is particularly warranted by the rapid changes in the common law in the past few decades on this very issue. See *Restatement (Third) of Torts: Apportionment of Liability* § 17 (2000). Respondents fail to refute this split of authority and common law trend or give any reason to delay review.

As an initial matter, Respondents do not dispute that there were other causes of their injuries, and, contrary to Respondents' assertions, Opp. 1, 9, N&W did present substantial evidence of these other causes of Respondents' injuries. First, two of the five Respondents had substantial exposure to asbestos for extended periods of time at non-railroad employment. *Id.* at 3. Second, three of the Respondents were habitual smokers, and any damages for lung disease and fear of cancer clearly should have been apportioned according to the risks created by smoking and by asbestos exposure. *Id.* at

4, 5. Third, as evidenced by complaints introduced into the record by N&W, Respondents had brought product liability actions alleging that asbestos manufacturers were solely responsible for their injuries. Pet. at 7-8. In fact, Respondents reached actual or contingent settlements with at least *31* other entities for the same injuries for which they were awarded damages here.[2]

Respondents simply cannot distinguish the principal decision with which the decision below is in conflict: namely, *Dale* v. *B&O Railroad*, 552 A.2d 1037 (Pa. 1989). None of the distinctions on which Respondents rely – indivisibility of injury or the presence of multiple tortfeasors – applies to *Dale*. First, *Dale*, like this case, involved indivisible injuries related to asbestos exposure. Second, Petitioner seeks apportionment not just among multiple tortfeasors, but as in *Dale* among the railroad's conduct and independent medical conditions (here, lung disease and fear of cancer attributable to smoking, and in *Dale*, independent lung disease). Third, the holding of *Dale* broadly and properly requires apportionment among the railroad and all other causes, regardless of whether those causes are independent tortfeasors:

> [W]e hold that an FELA employer whose employee has been injured partially by the employer's negligence and partially by other causes, whether those other causes relate to a preexisting condition *or to a concurrent, contemporaneous cause* arising from the circumstances of the injury, must pay damages only for those injuries attributable to its negligence.

*Id.* at 1041 (emphasis added). *Dale* unequivocally repudiated joint and several liability as inconsistent with the statutory scheme, in clear conflict with the decision below.[3] Similarly,

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[2] *See* Plaintiffs' Motions for Entry of Judgment Order (Petitioner's Supplemental Lodging Tab A).

[3] Respondents make the inherently implausible claim that a decision of a lower Pennsylvania court has called into doubt the validity of *Dale*.

all but two of the federal appellate decisions rejected joint-and-several liability for indivisible injuries from multiple causes, and are indistinguishable on the grounds which Respondents invoke. See Pet. 22-23.

Most of Respondents' arguments in favor of joint-and-several liability, although erroneous, are relevant only at the merits stage. The critical point is that Respondents, acknowledging that only "fifteen states . . . still retain pure joint and several liability," Opp. 23, do not contest that the recent prevailing and rapid trend in the common law has been away from joint and several liability, even for indivisible injuries. Pet. 25; see also *Restatement (Third) of Torts: Apportionment of Liability* § 17 cmt. a ("The clear trend over the past several decades has been a move away from pure joint and several liability.").[4] Indeed, "the predominant rule for independent tortfeasors who cause indivisible harm is a variety of hybrid schemes, entailing some joint and several liability and some several liability." See *id.* § D18 cmt. b.[5] This disparity in current apportionment methods further warrants the immediate establishment of a uniform standard in the FELA context. See *Dice* v. *Akron, Canton, & Youngstown R.R.*, 342

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Opp. 13 n.2. To the contrary, the lower court relied on its prior decision in *Dale*, apparently unaware that it had been vacated by the Supreme Court on that issue. *See McDermott* v. *Consolidated Rail Corp.*, 768 A.2d 348, 352-53 (Pa. Super. Ct. 2001).

[4] Respondents also argue that N&W failed to join any third-party defendants in the case below, or to make any effort to obtain contribution from any third parties. Opp. 3. Under prevailing common law principles, however, such actions are not necessary – and indeed, duplicative – where damages are apportioned among tortfeasors. *See Restatement (Third) of Torts: Apportionment of Liability* § B19 cmt. c (2000).

[5] Indeed, the Restatement sections cited by Respondents in favor of joint and several liability for indivisible injuries have been expressly superseded. *See Restatement (Third) of Torts: Apportionment of Liability* Parallel Table 2 (noting replacement of *Restatement (Second) of Torts* §§ 433A, 434, 879).

U.S. 359, 361 (1952). Contrary to Respondents' claims, Opp. 21-22, this Court does not usurp Congress's role by fulfilling its statutory "duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law." *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 432 (1958).

This case thus presents a clear vehicle for resolving the conflict among the lower courts.[6] In light of the rapid, definitive movement away from joint and several liability in the past few decades, the Court should establish a uniform standard for the apportionment of damages in FELA actions.

3. *The Realities Of FELA Mass Tort Litigation.* In their opposition, Respondents paint an idyllic picture of the conduct of mass tort litigation in West Virginia and elsewhere. Their assertions, however, reveal the exact opposite: the tactical targeting of pro-plaintiff jurisdictions to take full advantage of extraordinary rulings such as the decision below. It is no accident that 25,000 asbestos suits have been filed in West Virginia, and 2,500 FELA asbestos suits against railroads, Pet. 27, even though fewer than 3,000 railroad employees reside in West Virginia, AAR Br. 8 n.10. The need for uniform FELA standards on these questions could not be more apparent, and denial of certiorari would simply vindicate the strategy of the plaintiff's bar.

Respondents first attempt to downplay the impact of the decision below on future FELA asbestos litigation. Opp. 14. Specifically, Respondents assert that the ruling of the court below could only bear significance on other FELA litigation that is brought in that particular court. In fact, the plaintiff's bar is likely to flock even more often not only to Mingo

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[6] Contrary to Respondents' claims, Opp. 9, the offset by the court below in the amount of settlements with other tortfeasors (which only amounted to $36,549.39) does not affect Petitioner's right to proper apportionment. *Cf.* Final Judgment Orders (Petitioner's Supplemental Lodging Tab B)).

County,[7] but also to other West Virginia courts with the ruling below in hand.[8] To narrow the impact of the decision below to the particular court that rendered it is illusory.

Respondents also exaggerate the availability of appellate review in West Virginia. There is no right of appellate review in West Virginia. *Id.* at 14 n.4. Discretionary review is granted in only 30% of civil cases, *id.* at 15 n.4,[9] but more important is the nature of the cases in which review is denied. Respondents allege that the West Virginia Supreme Court has in the past reviewed FELA and asbestos cases, but the vast majority of cases cited were appeals raised by plaintiffs, not defendant railroads, or cases in which Supreme Court jurisdiction was original. *Id.* at 15 nn.5, 6. Railroads and other major corporations are frequently denied review on critical liability issues, even when there is clear error of law and (as here) the issues are squarely presented. It is the combination of populist juries and the infrequency of appellate review that makes certain jurisdictions in West Virginia irresistible to the plaintiff's bar.

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[7] Mingo County has long been a popular forum for non-resident plaintiffs and out-of-state lawyers. Notably, the Supreme Court of West Virginia wondered why a FELA plaintiff "who lives, worked, was injured and was treated in Tennessee, chose Mingo County, West Virginia for his forum." *Norfolk S. Ry.* v. *Maynard*, 437 S.E.2d 277, 280 n.3 (W.Va. 1993). Indeed, the court implied that the plaintiff's out-of-state lawyer orchestrated a constant flow of FELA lawsuits in Mingo County. *See id.*

[8] For example, the Association of American Railroads as *amicus curiae* refers to a FELA complaint recently filed in West Virginia mostly by non-resident named plaintiffs on behalf of a class of "'several hundred to several thousand workers,'" alleging toxic exposures and related risks of cancer. AAR Br. 6 n.7.

[9] Respondents' comparison of the percentage of cases reviewed by the West Virginia Supreme Court and the highest courts of other states is misleading. Opp. 15 n. 4. The vast majority of states have intermediate appellate courts, and therefore guarantee at least some appellate review.

Respondents also allege that West Virginia courts have dismissed FELA complaints on the grounds of *forum non conveniens*. Respondents support this assertion with the lodging of 15 dismissals in the past ten years. But seven of these orders were from a single county (McDowell County), and most dismissed cases were filed only by non-resident plaintiffs. By contrast, only one of these dismissals (from 1991, no less) was issued by the Circuit Court of Mingo County, which this year alone has denied two *forum non conveniens* motions in FELA cases involving non-resident plaintiffs.[10] Moreover, success on a *forum non conveniens* motion is often uncertain where the challenge is to alleged corporate negligence in failing to protect workers generally from occupational risks. Respondents' lodging at most illustrates that the courts of West Virginia sporadically dismiss FELA cases on grounds of *forum non conveniens*.

More importantly, the overriding significance of these rulings is crystal-clear: that the plaintiff's bar targets pro-plaintiff jurisdictions such as West Virginia for the filing of FELA cases on behalf of thousands of resident and non-resident plaintiffs. Pet. 27-28. Now that the court below has ruled that multimillion dollar judgments are proper for any plaintiff with asbestos-related symptoms without a showing of any severe emotional injury, and denied apportionment, there can be no doubt that the West Virginia courts will be the principal locus for FELA litigation against the major Eastern railroads.

## CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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[10] Orders Denying Motion to Dismiss on Grounds of *Forum Non Conveniens* (Petitioner's Supplemental Lodging Tab C).

Respectfully submitted,

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